IN THE HIGH COURT OF JUDICIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2686 OF 2002

Union of India
Through the Commissioner of
Customs (Preventive), New
Customs House, Ballard
Estate, Mumbai - 400 038 .. Petitioner.

V/s.

1. Harshad P. Doshi, of
Mumbai, Indian Inhabitant
residing at 202, Shyam
Kutir, Azad Road,
Vile Parle (East),
Mumbai - 400 057.

2. Bharat M. Shah of Mumbai
Indian Inhabitant, resid-
ing at 12, Valmiki,
60 Feet Road, Ghatkopar
(East), Mumbai - 400 077.

3. The Hon'ble Customs, Excise
& Gold (Control) Appellate
Tribunal, West Regional
Bench, Mumbai .. Respondents.

Mr.R.V. Desai, senior advocate with Mr.Rajiv Chavan for the petitioner.

Mr.S.N. Kantawala i/b. M/s. Kantawala & Co. for the respondent Nos.1 and 2.

CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.

DATED : 16TH NOVEMBER, 2005.

ORAL JUDGMENT (PER H.L. GOKHALE, J.) :

1. Heard Mr.R.V. Desai with Mr.Rajiv Chavan for the petitioner. Mr.Kantawala appears for respondent Nos.1 and 2.

2. This petition seeks to challenge the order passed by the Customs Excise and Gold (Control) Appellate Tribunal ('CEGAT' for short) in appeal No.C/484/01-MUM and C/485/2001/01-MUM on May 25, 2001 which allowed the appeal filed by respondent Nos.1 and 2 herein.

3. The short facts leading to this petition are given as under :

4. A large quantity of smuggled ball bearings and electrical goods were found stored in the warehouse of one M/s.Saradha Trading Corporation. It was stated that they were imported at Calcutta and were meant for Nepal but were diverted to Mumbai for sale in open market. Some 213 cases of Spark plugs and 444 cases of ball bearings of foreign origin were found in the premises. They were found to be originating from Romania, Czechoslovakia, Russia and Poland.

5. In the present matter, we are concerned with the 219 cases of ball bearings which were supposed to be under the control and custody of Mr.Bhupatbhai M. Shah and 55 cases of which were supposed to be under the control and custody of one Mr.Harshad Doshi who are respondent Nos.1 and 2. As far as other cases and

cartons are concerned, some explanation was given and it was accepted by the Customs authorities. The statements of these Mr.Bhupatbhai M. Shah and Mr.Harshad Doshi were recorded under Section 108 of the Customs Act on July 21, 1998 where they did not dispute that these articles were of foreign origin. They were, however, not in a position to give any explanation as to who such large quantity of ball bearings were found under their control and custody. They did not have any document to justify the purchase of these articles. It was in these circumstances that a show cause notice was issued which was followed by an adjudication and the Commissioner of Customs who heard the matter after giving full opportunity to the parties came to the conclusion that there was no explanation for the goods which were found under the control and custody of the respondent Nos.1 and 2 herein. The Commissioner, therefore, came to the conclusion that they were in possession of prohibited goods in terms of Section 111(d) of the Customs Act and, therefore, directed confiscation. He, however, directed that the persons concerned may redeem these goods on payment of fine of Rs.80,000/- in the case of respondent No.1 and Rs.9,50,000/- in case of respondent No.2.

6. This order passed on March 13, 2001 was

carried in appeal and has been reversed by the impugned order. The impugned order referred to abovereferred findings of the original authority given in para 25 of the original order. The Tribunal noticed that this is undoubtedly a matter of great suspicion which is what is stated in para 5 and as stated above. Relevant paragraph of the original order is quoted in paragraph 6. The only reasoning in this order is what is stated in paragraph Nos.8 and 9 of the impugned order and these two paragraphs read as follows :

> "8. At this stage Shri Sarkar intervenes and submits that the adjudication order is of recent date and the Revenue have still time to file an appeal. The arguments has merits but in the face of the lack of any cogent evidence either in the show cause notice or in the analysis made by the Commissioner, the proceedings would have no other outcome.
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> 9. Accepting the contention that no evidence has been placed on record that the goods were illegally imported, the appeals are allowed with consequential relief."

7. To say the least, we are amazed by the order which the Tribunal has passed. All that we find is that in paragraph 9 as recorded above, the Tribunal has accepted the contention that no evidence is placed that the goods were illegally imported. Now as narrated above large consignments of these ball bearings of foreign origin were found in the control and custody of respondent Nos.1 and 2. They did not

dispute that they were of foreign origin. They did not explain as to where from they were purchased. Mr.Kantawala, learned counsel appearing for respondent Nos.1 and 2 drew our attention to paragraph 17 of the original order wherein it is recorded that at the time of personal hearing, the respondent Nos.1 and 2 tendered a copy of bill of entry where the ball bearings were cleared by the Customs House Agent. He has however not given any particulars of these imports. On the contrary, in the statements which were made under Section 108 of the Customs Act, both the respondents stated that they have purchased these ball bearings in open market. Thus the respondent Nos.1 and 2 have been shifting their stand from time to time. This is an aspect which has been completely ignored by the Tribunal.

8. Mr.Desai, learned senior counsel appearing for the petitioner, therefore, submits that under Section 106 and 114 of the Evidence Act, the burden has shifted on respondent Nos.1 and 2. The respondent Nos.1 and 2 had the responsibility to explain the facts which were specially within their knowledge as required by Section 106 of the Evidence Act and on the totality of these facts certain appropriate inference had to be drawn as permitted by Section 114 of the Evidence Act. He submitted that the same had rightly

been done by the Commissioner and the Tribunal was in error in interfering with that findings.

9. Mr.Kantawala, referred to some circulars of the Department issued way back on December 14, 1965 which states that the onus is always on the customs authorities to establish that the goods were imported contrary to any import prohibition. He has however not been able to show upto date position. That apart these circulars were not relied upon before the lower authorities. In any case they cannot be relied upon against the statutory provisions. In State of Maharashtra V/s. Natwarlal Damodardas Soni [AIR 1980 Supreme Court 593], the Apex Court has considered the provisions of Section 123(1) of the Customs Act and has specifically stated that even in cases where Section 123(1) of the Customs Act is not attracted, which provision makes certain presumptions, the prosecution can still discharge its burden by establishing circumstances from which a prudent man, acting prudently, may infer that in all probability the goods in question were smuggled goods. The Court has also referred to Section 111(d) of the Customs Act which has been pressed into service by the Commissioner and has held that in the facts of that case the disputed import would be covered under Section 111(d) of the Customs Act. Relevant para 18

of the judgment reads as follows :

> "18. It is trite law that even in cases where Section 123(1) of the Customs Act is not attracted, the prosecution can discharge its burden by establishing circumstances from which a prudent man, acting prudently, may infer that in all probability the goods in question were smuggled goods, and the accused had the requisite guilty knowledge in respect thereof. The leading case is Issardar Daulat Ram v. Union of India, 1962 Supp (1) SCR 358. In that case, in reaching the conclusion that the gold had been smuggled, the Collector of Customs considered the credibility of the story put forward by the appellant about the puchase of the gold and also the conduct of the appellant in trying to get the gold melted so as to reduce its fineness by mixing silver with it, in an attempt to approximate the resultant product to licit gold found in the market. The ratio of this decision was followed by this Court in Labhchand Dhanpat Singh Jain v. State of Maharashtra, AIR 1975 SC 182. The appellant-accused therein was trying to enter the Railway compartment at Bombay Station. Seeing his nervousness, the Railway police questioned him and searched his person and recovered nine bars of gold with foreign markings. The accused put forward an incredible story with regard to the possession of the gold. This Court held, that in the circumstances of the case, an inference could very well be drawn that the gold must have been imported after the law passed in 1948, restricting its entry, that the burden of proving an innocent receipt of gold lay upon the appellant under Section 106, Evidence Act and that the totality of facts proved is enough to raise a presumption under Section 114, Evidence Act; that the gold had been illegally imported into the country, so as to to be covered by Section 111(d) of the Customs Act."

10. Mr.Kantawala referred to the Division Bench judgment of the Calcutta High Court in CC (Preventive), West Bengal, Kolkata V/s. Sudhir Saha [2004 (63) RLT 811 (Cal.)]. In that judgment, the

Division Bench had referred to Section 123 of the Customs Act in the context of import of gold and it is observed that those principles will not be available in cases which are not covered under Section 123 of the Act. It is relevant to note that the judgment in the case of State of Maharashtra V/s. Natwarlal Damodardas Soni has not been brought to the notice of the Division Bench and, therefore, the judgment rendered is contrary thereto and it is difficult for us to follow the same.

11. In the circumstances, the order passed by the Tribunal will have to be interfered. We allow the petition in terms of prayer clause (a). The order passed by the CEGAT on May 25, 2001 will stand quashed and set aside. We may add that when the petition was admitted, an interim order has been passed in terms of prayer clauses (b) and (c) thereby the operation of this order has been stayed and further implementation cannot be done. Although the petition is allowed as above, it will be open to the respondent Nos.1 and 2 to redeem the goods if they want to redeem that as per the order which was passed earlier by the Commissioner.

12. Rule is made absolute in terms of this order with no order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)